(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Billy Yee	)	TSCA Appeal No. 00-2
Docket No. TSCA-7-99-0009	)	

[Decided May 29, 2001]

FINAL DECISION

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

BILLY YEE

TSCA Appeal No. 00-2

FINAL DECISION

Decided May 29, 2001

Syllabus

Billy Yee ("Appellant") appeals an Initial Decision of the presiding Administrative Law Judge ("Presiding Officer") assessing a civil penalty against Appellant under the Toxic Substances Control Act ("TSCA") section 409, 15 U.S.C. § 2689, in response to Appellant's alleged violations of regulations promulgated pursuant to the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4851.

The United States Environmental Protection Agency Region VII (the "Region") filed a six-count administrative complaint against Appellant, alleging that he violated the requirements of 40 C.F.R. part 745, subpart F, entitled, "Disclosures of Known Lead-based Paint and/or Lead-based Paint Hazards Upon Sale or Lease of Residential Property" (the "Disclosure Rule"). Specifically, the complaint alleged that Appellant violated the Disclosure Rule when he entered into a contract to lease property without providing the required lead-based paint disclosures to the lessee. After filing an initial answer to the complaint, Appellant filed an Amended Answer wherein he admitted the allegations of the Region's complaint, but asserted as a defense that the operative provisions of the Disclosure Rule were not in effect at the time of the alleged violations.

In response to the Region's motion for an accelerated decision as to liability, and, in view of Appellant's failure to file a response in opposition to the motion, the Presiding Officer ruled in the Region's favor on liability. The Presiding Officer concluded that, by failing to respond, Appellant had waived any objection to the granting of the motion. The Presiding Officer further concluded that even if she considered Appellant's defense that the applicable regulations were not in effect at the time of the alleged violation, that defense was deficient on its merits. Subsequently, after an evidentiary hearing on the issue of the amount of the penalty, the Presiding Officer assessed a civil penalty of $29,700.

Appellant raises a single issue on appeal: whether the Presiding Officer erred in ruling that the Region could enforce the Disclosure Rule when the *Code of Federal Regulations* in circulation at the time of the alleged violations included an editorial note stating that the applicable regulations would not take effect until OMB granted approval of the information collection provisions of the Disclosure Rule pursuant to the requirements of the Paperwork Reduction Act, 44 U.S.C. §3501.

Held: (1) The Board affirms the Presiding Officer's ruling that Appellant waived this defense. By failing to raise the defense in response to the motion for accelerated decision, Appellant waived it both below and for purposes of review on appeal.

(2) The Board further affirms the Presiding Officer's ruling that, even if considered, Appellant's defense fails on its merits. Editorial notes of the kind cited by Appellant are not rules and do not have the force of law; they thus cannot serve to override otherwise enforceable regulatory requirements. In any case, Appellant overstates the thrust of the editorial note. Fairly read, the note conveyed that the regulation could be in effect at any time, and put the reader on notice to check further before assuming non-enforceability. Had he consulted other provisions of the *Code of Federal Regulations*, Appellant would have learned that the regulations were, in fact, in effect. To the extent that an editorial note of this kind in the *Code of Federal Regulations* causes genuine confusion for the regulated community, this is an issue that may be considered in the context of penalty assessment. In this case, Appellant has not alleged, nor is there any evidence, that he relied on the editorial note to his detriment. Thus, the Board finds no basis for penalty mitigation on this ground and upholds the Presiding Officer's ruling.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

I. *INTRODUCTION*

Billy Yee ("Appellant") has appealed an Initial Decision issued June 6, 2000, in which the Presiding Officer assessed a civil penalty of $29,700 against Appellant for violating the Toxic Substances Control Act ("TSCA") Section 409, 15 U.S.C. § 2689, by failing to comply with the

regulatory requirements of 40 C.F.R. part 745, subpart F, "Disclosures of Known Lead-based Paint and/or Lead-based Paint Hazards Upon Sale or Lease of Residential Property" (the "Disclosure Rule"), promulgated to implement the provisions of the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4851. For the reasons discussed below, we reject Appellant's arguments in this case and affirm the Presiding Officer's finding of liability and her assessment of a $29,700 civil penalty.

II. *BACKGROUND*

A. *Statutory Background*

Congress passed Title X of the Housing and Community Development Act of 1992 under the common name of the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("RLBPHRA"), Pub. L. No. 102-550, 106 Stat. 3672 (1992) (codified in part in chapters 15 and 42 the United States Code). One of the stated purposes of the RLBPHRA is "to develop a national strategy to build the infrastructure necessary to eliminate lead-based paint hazards in all housing as expeditiously as possible." 42 U.S.C. § 4851a(1).

In furtherance of that goal, the RLBPHRA amended TSCA, requiring the Secretary of the Department of Housing and Urban Development ("HUD") and the Administrator of the United States Environmental Protection Agency (the "Agency" or "EPA") to promulgate regulations for the disclosure of "lead-based paint hazards in target housing which is offered for sale or lease." RLBPHRA § 1018(a)(1), 42 U.S.C. § 4852d(a)(1). These regulations were to require that, "before the purchaser or lessee is obligated under any contract to purchase or lease housing," the seller or lessor shall make certain disclosures to the purchaser or tenant. *Id*. In March 1996, EPA and HUD issued joint regulations known as the "Real Estate Notification and Disclosure Rule." *See* 61 Fed. Reg. 9064 (Mar. 6, 1996). EPA's regulations are codified at 40 C.F.R. part 745, subpart F, and HUD's regulations are codified at 24 C.F.R. part 35, subpart H.

B. *Regulatory Background*

The Disclosure Rule generally provides that certain "activities shall be completed before the purchaser or lessee is obligated under any contract to purchase or lease target housing that is not an otherwise exempt transaction." 40 C.F.R. § 745.107(a). As relevant to this case, the activities that are required to be completed include the following: (1) the seller or lessor shall provide the purchaser or lessee with an EPA-approved lead hazard information pamphlet, 40 C.F.R. § 745.107(a)(1); (2) each contract to lease target housing shall include an attachment containing a Lead Warning Statement consisting of certain language specified by the regulations, *id*. § 745.113(b)(1); (3) each contract to lease target housing shall disclose the presence of any known lead-based paint and/or lead-based paint hazards in the target housing, *id*. § 745.113(b)(2); (4) each contract to lease target housing shall include a list of any records or reports that are available pertaining to lead-based paint and/or lead-based paint hazards, *id*. § 745.113(b)(3); (5) each contract to lease target housing shall include a statement by the purchaser affirming receipt of the information specified above, *id*. § 745.113(b)(4); and (6) each contract to lease target housing shall include the signatures of the lessors and lessees certifying the accuracy of their statements, *id*. § 745.113(b)(6).

Both RLBPHRA and the Disclosure Rule define "target housing" as "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling." *Compare* 42 U.S.C. § 4851b(27) *with* 40 C.F.R. § 745.103. While neither the Disclosure Rule nor the RLBPHRA defines the terms "lease" or "contract to lease," the Disclosure Rule defines the term "lessor" as "any entity that offers target housing for lease, rent, or sublease, including but not limited to individuals, partnerships, corporations, trusts, government agencies, Indian tribes, and nonprofit organizations." 40 C.F.R. § 45.103.

As promulgated, the Disclosure Rule included a provision stating that the requirements would take effect on September 6, 1996, for owners of more than four residential dwellings, and that the requirements would take effect on December 6, 1996, for owners of one to four residential dwellings. *See* 61 Fed. Reg. 9064, 9086 (Mar. 6, 1996); 40 C.F.R. §745.102. The preamble in the Federal Register contained a proviso that sections 745.107 and 745.113 would not take effect until OMB approved previously submitted information collection requests for subpart F, Information Collection Request ("ICR") No. 1710.02. *See* 61 Fed. Reg. at 9064.

The information collection requests regarding subpart F, including sections 745.107 and 745.113, were subsequently approved by the Office of Management and Budget ("OMB") on April 22, 1996, and assigned OMB Control No. 2070-0151, as required by the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3501.[1] On May 31, 1996, EPA placed the regulated community on notice that all of subpart F was in effect by publishing notice of OMB's approval in the *Federal Register*. *See* 61 Fed. Reg. 27,348, 27,349 (May 31, 1996). In addition, beginning in an edition published July 1, 1996, Title 40 of the *Code of Federal Regulations* contained the OMB control number in a table in 40 C.F.R. part 9 (the "Part 9 Table"), entitled "OMB approvals under the

[1]The PRA was originally enacted in 1980, Pub. L. No. 96-11, 94 Stat. 2812 (originally codified at 44 U.S.C. §§ 3501-3520), in response to the mounting burden of federal paperwork requirements imposed upon the public. *See* 44 U.S.C. § 3501(1) (1980). The 1980 PRA was subsequently re-authorized and amended in October, 1986, via the Paperwork Reduction Act Reauthorization Amendments of 1986, Pub. L. No. 99-500, § 101(m), 100 Stat. 1783-335 & Pub. L. No. 99-591, § 101(m), 100 Stat. 3341-335. This amended PRA was subsequently overhauled by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (presently codified at 44 U.S.C. §§ 3501-3520). Among other things, the PRA applies to rules that contain "collections of information" and requires an agency to: (1) justify to OMB its proposed collection of information; (2) show that the collection is the least burdensome information collection possible and is not duplicative of other federal information collections; and (3) demonstrate that the collected information will have practical utility. *See* 44 U.S.C. § 3501 *et seq*.

Paperwork Reduction Act," which "consolidates the display of control numbers assigned to collections of information in certain EPA regulations by the Office of Management and Budget (OMB) under the Paperwork Reduction Act." *See* 40 C.F.R. § 9.1 (1996, 1997, 1998).[2] The 1996 edition of the C.F.R., however, along with those published in 1997 and 1998, also included an editorial note after sections 745.107 and 745.113 consistent with the March 6, 1996 *Federal Register* preamble, stating that the regulations would not become effective until OMB approval. *See* 40 C.F.R. § 745.107 (1996, 1997, 1998).[3] Because the necessary OMB approval had already been secured at the time the 1996 edition of the C.F.R. was published, the inclusion of the effective date note in that edition, and the two editions that followed, was apparently a mistake. EPA subsequently identified the error and published in the *Federal Register*, a "Correction to Reflect OMB Approval of Information Collection Requirements," requesting that the Office of Federal Register remove the erroneous editorial note from the *Code of Federal Regulations* at 40 C.F.R. part 745, subpart F. *See* 64 Fed. Reg. 39,418 (July 22, 1999).

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[2]The use of tables like the Part 9 Table as a central location for ICR approvals is explicitly contemplated by OMB's regulations. See 5 C.F.R. § 1320.3(f)(3) ("OMB recommends for ease of future reference that, even where an agency has already 'displayed' the OMB control number by publishing it in the Federal Register, * * * the agency also place the currently valid control number in a table or codified section to be included in the Code of Federal Regulations.").

[3]The Region maintains, and Appellant does not dispute, that effective date notes of the kind at issue here are prepared not by the Agency responsible for the rule to which the note is attached, but rather, are editorial notes prepared by the Office of the Federal Register ("OFR") as a convenience to C.F.R. readers. Region's Brief at 6. Such notes serve various educational purposes, such as providing historical citations to the daily issues of the Federal Register, citations to relevant statutory authorities, and, as in this case, reference to the ICR process under the PRA. *Id.* As such, they are decidedly distinct from provisions of the regulations themselves that determine when, separate and apart from the PRA, regulatory obligations attach. For example, there is a discrete provision of the Disclosure Rule – section 745.102 (entitled, "Effective dates") – that establishes when "[t]he requirements of this subpart take effect * * * ." *Id.*

C. *Factual Background*

Since 1993, Appellant has been engaged in the business of buying, renovating, and renting out older residential housing in the St. Louis, Missouri area. Transcript of Hearing (Dec. 21, 1999) ("Tr.") at 122. On November 8, 1997, he entered into an oral lease agreement with Karen Lovett for a four-bedroom townhouse located at 3306 Cherokee Street, St. Louis (the "Property"). *Id*. at 14. The Property was constructed in or about 1904. *See* Complainant's Exhibit ("C Ex.") 4 at 2. As such, the Property fell under the definition of "target housing" set forth in the Disclosure Rule. *See* 1st Joint Set of Stipulated Facts, Exhibits, and Testimony (Oct. 21, 1999) ("Joint Stip.") at 1.

On or about November 8, 1997, Ms. Lovett moved onto the Property with her six children -- two girls and four boys -- ranging in age from eighteen months to thirteen years old. Tr. at 15-16; C Ex. 3. Ms. Lovett testified at the hearing held in this matter that the Property had cracking and peeling paint around the front door, in the children's bedroom closet and in other areas of the house. Tr. at 18. Appellant did not provide Ms. Lovett with a lead disclosure form to sign, nor did he provide her with any reports relating to lead-based paint. Tr. at 14-15; C Ex. 3. Ms. Lovett testified that Appellant visited the Property each month to collect the rent personally. Tr. at 25.

Ms. Lovett described her children's health as "fine" prior to moving into Appellant's townhouse. Tr. at 16. According to Ms. Lovett, however, after moving into the townhouse her children began to experience a deterioration in their eating and sleeping habits and became hyperactive, and two of her children began to suffer speech problems. Tr. at 16, 38. In February 1998, Ms. Lovett's four sons were diagnosed with lead poisoning and were hospitalized. *Id*. at 17. Two of Ms. Lovett's sons were hospitalized twice, one was hospitalized four

times, and another was hospitalized a total of five times for chelation treatment[4] for lead poisoning. *Id.* at 17, 24-25; C Ex. 5.

Dr. Don Weiss, a pediatrician and physician for the City of St. Louis Department of Health who holds a Master of Public Health degree in epidemiology and is an expert in the field of childhood lead poisoning, testified that the Center for Disease Control has stated that lead levels of 10 micrograms per deciliter ("Fg/dl") is a cause for concern. Tr. at 28-34. Dr. Weiss also testified that once lead levels exceed 45 Fg/dl, drug treatment with chelation drugs becomes necessary.[5] *Id*. at 33. When two of Ms. Lovett's children were tested on February 3, 1998, their lead levels were 76 Fg/dl and 68 Fg/dl, respectively. *See* C Ex. 5. The following month, three of Ms. Lovett's remaining children were tested, and their lead levels were 52 Fg/dl, 44 Fg/dl, and 31 Fg/dl, respectively. *Id.* According to Dr. Weiss, Ms. Lovett's four sons remained under medical care for lead poisoning and had to be reevaluated regularly. Tr. at 18. Ms. Lovett's children were not allowed to return to the Property after their second hospitalization, and alternative living arrangements had to be made for them. Tr. at 21-22.

As a result of Ms. Lovett's children's diagnoses, the City of St. Louis Department of Health and Hospitals ("DHH") inspected the Property in February 1998, and discovered accessible lead-based paint

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[4]Chelation treatment refers to the process by which metal is removed from the blood system. Tr. at 34. Chelation drugs, which have an affinity for lead, are administered orally, intravenously, or injected intramuscularly. *Id*. According to Dr. Don Weiss, chelation treatment is not a very efficient method because it only removes the lead in the blood, leaving the lead that is stored in the bone. *Id*. at 34, 39.

[5]Dr. Weiss testified that at the very low end of lead poisoning, the symptoms are subtle: inattentiveness, trouble learning in school, hearing problems, and speech problems. Tr. at 34-35. At higher lead levels, the symptoms are hyperactivity, loss of appetite, constipation, and nerve problems. Tr. at 35. At even higher levels, close to 100 Fg/dl, children may have seizures, develop coma, brain edema, and may die. *Id*.

in several areas of the Property. Tr. at 18-19, 44-46. DHH sent a letter to Appellant detailing the violations and requiring that the Property be brought into compliance. *Id*; *see* C Ex. 6. In addition, DHH issued a "tip and complaint" to the Region, informing the Region that Appellant had failed to comply with the Disclosure Rule prior to entering into a lease agreement with Ms. Lovett. Tr. at 68.

In response to DHH's tip and complaint, the Region issued a request for information to Appellant in March, 1998. *Id*. at 69. When Appellant failed to respond to the Region's request, the Region issued a second request for information in May, 1998. *Id*. After Appellant also failed to respond to that request for information, the Region issued a subpoena to him on July 2, 1998. *Id*; *see* C Ex. 1. The Region's subpoena directed Appellant to provide the information and copies of documents in his possession or control, or the possession or control of his employees, agents, servants, consultants or attorneys, which pertained to his compliance with the Disclosure Rule. *See* C Ex. 1. On July 31, 1998, Appellant filed an affidavit responding to the Region's subpoena, wherein he stated that "there was no written lease," and "the terms of the oral rental agreement with Ms. Lovett was on a month-to-month basis * * *." C Ex. 2. Appellant also asserted that "Ms. Lovett was not provided with the EPA pamphlet 'Protect Your Family From Lead in Your Home,'" and "[b]ecause I lacked any knowledge of the presence of lead substance at 3306 Cherokee, I did not disclose such information to Ms. Lovett." *Id*.

D. *Procedural Background*

1. *The Region's Complaint*

On February 4, 1999, the Director of the Air, RCRA, and Toxics Division in EPA Region VII (the "Region"), pursuant to section 16(a) of TSCA, as amended, 15 U.S.C. § 2615(a), issued an administrative complaint against Appellant. The complaint alleged that Appellant violated section 409 of TSCA, 15 U.S.C. § 2689, by failing to comply with the disclosure requirements of 40 C.F.R. part 745, subpart F - the

Disclosure Rule. Specifically, the complaint alleged that Appellant violated the Disclosure Rule when he entered into a contract to lease the Property to Ms. Lovett, and failed to provide the required lead-based paint disclosures to the lessee, Ms. Lovett, prior to Ms. Lovett becoming obligated under the lease contract. The complaint contained a total of six counts, and proposed a total penalty of $29,700 for these violations.[6]

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[6]Count I alleged that Appellant violated 40 C.F.R. § 745.107(a)(1) by failing to provide an EPA-approved lead hazard information pamphlet to Karen Lovett before she became obligated under the contract to lease target housing. The Region proposed a penalty of $11,000 for this violation.

Count II alleged that Appellant violated 40 C.F.R. § 745.113(b)(1), and section 409 of TSCA, 15 U.S.C. § 2689, by failing to include, either as an attachment to or within the rental contract, a lead warning statement with the language required by 40 C.F.R. § 745.113(b)(1). The Region proposed a civil penalty of $6,600 for this violation.

Count III alleged that Appellant violated 40 C.F.R. § 745.113(b)(2) and section 409 of TSCA, 15 U.S.C. § 2689, by failing to include, either as an attachment to or within the rental contract, a statement disclosing his knowledge, or lack of knowledge, of the presence of lead-based paint and/or lead-based paint hazards in the Property. The Region proposed a penalty of $6,600 for this violation.

Count IV alleged that Appellant violated 40 C.F.R. § 745.113(b)(3) and section 409 of TSCA, 15 U.S.C. § 2689, by failing to include, either as an attachment to or within the rental contract, a list of any records or reports available to him pertaining to lead-based paint and/or lead-based paint hazards in the housing that had been provided to Karen Lovett, or an indication that no such records or reports were available if that was the case. The Region proposed a penalty of $2,200 for this violation.

Count V alleged that Appellant violated 40 C.F.R. § 745.113(b)(4) and section 409 of TSCA, 15 U.S.C. § 2689, by failing to include, either as an attachment to or within the rental contract, a statement by Karen Lovett affirming her receipt of the information required by 40 C.F.R. § 745.113(b)(2) and (3) and the lead hazard information pamphlet required under 40 C.F.R. § 745.113(b)(4). The Region proposed a penalty of $2,200 for this violation.

(continued...)

2. *Appellant's Answers to the Region's Complaint*

Appellant filed an Answer to the Region's Complaint on February 26, 1999. In the Answer, Appellant averred that he was "unaware of the various EPA sections and regulations cited in the Government's Complaint," and that he "did not knowingly or intentionally violate any EPA section or regulation." Answer at 1. On May 3, 1999, Administrative Law Judge Susan L. Biro ("Presiding Officer") issued an Initial Prehearing Order finding that the Answer did not comply with the requirements of 40 C.F.R. § 22.15, and requiring Appellant to file an amended answer by May 28, 1999. Appellant failed to file an amended answer or request a time extension by the May 28, 1999 deadline. On June 3, 1999, the Presiding Officer issued an order requiring Appellant to show cause why he failed to submit an amended answer as required by the Initial Prehearing Order and why a default order should not be entered against him. On June 14, 1999, Appellant filed an Amended Answer wherein he admitted the allegations of the Region's complaint, but raised the issue of whether 40 C.F.R. §§ 745.107 and 745.113 were in effect in November 1997, the time of the alleged violations. As discussed below, Appellant made no further efforts in the proceeding before the Presiding Officer to advance this particular defense.

3. *The Partial Accelerated Decision*

On June 14, 1999, the Presiding Officer issued a Prehearing Order establishing the schedule for the filing of prehearing exchanges. On July 28, 1999, the Region filed its Prehearing Exchange, and on

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[6](...continued)

Count VI alleged that Appellant violated 40 C.F.R. § 745.113(b)(6) and section 409 of TSCA, 15 U.S.C. § 2689, by failing to include, either as an attachment to or within the rental contract, his signature and the signature of Karen Lovett, certifying to the accuracy of their statements required by 40 C.F.R. part 745, subpart F. The Region proposed a penalty of $1,100 for this violation.

August 26, 1999, Appellant filed his Prehearing Exchange. On September 10, 1999, the Region filed a Rebuttal Prehearing Exchange.

On October 8, 1999, the Region moved for partial accelerated decision as to liability on all six counts of the complaint. *See* Complainant's Motion for Partial Accelerated Decision as to Liability. Appellant failed to file a response in opposition to the motion. As a result, the Presiding Officer issued an order on November 8, 1999, concluding that Appellant had waived any objection to the granting of the motion and ruling that the Region was therefore entitled to judgment as a matter of law. *See* Order Granting Complainant's Motion for Partial Accelerated Decision as to Liability at 2. Notwithstanding her conclusion that Appellant had waived any objections to the Region's motion and, concomitantly, to the imposition of liability, the Presiding Officer proceeded to consider the merits of the Region's motion and, in that context, also considered the viability of Appellant's defense that 40 C.F.R. §§ 745.107 and 745.113 were not in effect at the time of the alleged violation, ultimately concluding that the defense was without merit. *Id*. at 2-6. Accordingly, the Presiding Officer granted in full the Region's motion for partial accelerated decision, finding Appellant liable for each of the six counts and leaving the appropriate amount of the civil penalty to be determined by an evidentiary hearing. *Id*. at 6.

4. *The Assessment of a Penalty*

On December 21, 1999, an evidentiary hearing was conducted before the Presiding Officer in St. Louis, Missouri, pursuant to 40 C.F.R. part 22. Since liability was previously established on motion for partial accelerated decision, the only issue during the hearing was the amount of the penalty to be assessed and, in particular, whether Appellant had the ability to pay the penalty proposed by the Region. No other arguments or issues relating to penalty were advanced by Appellant at the evidentiary hearing.

On June 6, 2000, the Presiding Officer issued an Initial Decision finding it appropriate to impose against Appellant an aggregate civil

penalty in the amount of $29,700 for the violations established in the accelerated decision on liability.

E. *The Appeal*

This appeal, which was filed on July 11, 2000, raises one issue: whether the Environmental Protection Agency may enforce 40 C.F.R. § 745.107 and 40 C.F.R. § 745.113 for violations alleged to have occurred in November 1997 when the *Code of Federal Regulations* in circulation at that time included an editorial note stating that the regulations would not take effect until OMB granted approval of the information collection provisions. *See* Appellant's Notice of Appeal and Appeal Brief ("Appellant's Brief") at 5-7. The Region filed its Reply Brief on July 25, 2000. Brief of Appellee United States Environmental Protection Agency ("Appellee's Brief").

III. *DISCUSSION*

We turn now to the sole issue presented on appeal, which has two facets. First, we will consider whether the Presiding Officer erred in ruling that Appellant had waived its defense in the proceeding below. Second, because, notwithstanding her conclusion that this defense had been waived, the Presiding Officer proceeded to address its merits, we will in turn consider whether she erred in her conclusion on the merits.[7]

The Board generally reviews the Presiding Officer's factual and legal conclusions on a de novo basis, *see* 40 C.F.R. § 22.30(f), but may apply a deferential standard of review to issues such as the Presiding Officer's findings of fact where the credibility of witnesses is at issue, *see In re Tifa Ltd.*, FIFRA Appeal No. 99-5, slip op. at 10 n.8 (EAB, June 5, 2000), 9 E.A.D. ___; and decisions regarding discovery, *see In*

[7]We read the Presiding Officer's decision as resting on alternative grounds. We will address both grounds in our review.

re Chempace Corp., FIFRA Appeal Nos. 99-2 & 99-3, slip op. at 23 (EAB, May 18, 2000), 9 E.A.D. ___.

A. *The Presiding Officer Did Not Err in Finding Appellant Liable for Violating the Disclosure Rule*

1. *Appellant Waived His Right To Raise Issues Regarding Liability*

Appellant argues that sections 745.107 and 745.113 of the Disclosure Rule were not in effect at the time of Appellant's violations in November, 1997 and, thus, not enforceable, because the *Code of Federal Regulations* contained an editorial note that provided that those sections would not become effective until OMB granted approval. *See* Appellant's Brief at 4-6. Significantly, Appellant did not raise the issue of the Disclosure Rule's enforceability before the Presiding Officer as a reason for denying the Region's Motion for Partial Accelerated Decision ("Motion"). In fact, Appellant did not file any formal opposition to the Motion. The Presiding Officer thus concluded that Appellant had waived any objection to the granting of the motion and ruled that the Region was entitled to judgment as a matter of law as to all six counts in the Complaint. *See* Order Granting Complainant's Motion for Partial Accelerated Decision as to Liability at 6. As such, Appellant's liability was not at issue during the evidentiary hearing later conducted before the Presiding Officer.

The Accelerated Decision "is governed by an administrative summary judgment standard, requiring the timely presentation of a genuine and material factual dispute, similar to judicial summary judgment under Rule 56, Fed. R. Civ. P." *In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 769 (EAB 1997); *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB 1997); *see also In re Rogers Corp.*, TSCA Appeal No. 98-1, slip op. at 18 (EAB, Nov. 28, 2000), 9 E.A.D. ___. ("arguments and evidence not presented in the district court in connection with a summary judgment motion are waived on appeal * * *."); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 424 (1980) ("a litigant may not raise on

appeal those issues he has failed to preserve by appropriate objection in the trial court.").

In addition, Rule 22.16(b) of the Consolidated Rules of Practice provides, in pertinent part, "[a]ny party who fails to respond within the designated period waives any objection to the granting of the motion." 40 C.F.R. § 22.16(b) (2000). Accordingly, by failing to raise the enforceability of the Disclosure Rule argument before the Presiding Officer in connection with the Partial Accelerated Decision, Appellant waived it both below and for purposes of review. In any event, as discussed below, even if we consider the merits of Appellants argument, we conclude that Appellant has not mounted a viable defense.

2. *Sections 745.107 and 745.113 Became Effective and Enforceable Upon OMB Approval*

The regulations implementing the PRA require that proposed rules that contain information collection provisions must be submitted for review to OMB, along with supporting documents, no later than the date of publication of the notice of proposed rulemaking ("NPRM") in the *Federal Register*. 5 C.F.R. § 1320.11(b). An agency must, in the NPRM, notify the public that the rule has been sent to OMB and that the public may file comments on the information collection provisions with OMB during the time in which OMB reviews the agency's information collection request ("ICR"). *Id*. § 1320.11(a). When the final rule is published in the *Federal Register*, the agency must explain how any collection of information contained in the final rule responds to any comments received from OMB or the public. *Id*. § 1320.11(f). After reviewing an ICR, OMB may disapprove, approve, or place conditions which must be met for approving the ICR. *Id*. § 1320.11(h).

When OMB approves an ICR contained in a final rule,[8] the information collection provisions are enforceable. *See The Paperwork Reduction Act of 1995: Implementing Guidance for OMB Review of Agency Information Collection, Office of Information and Regulatory Affairs, Office of Management and Budget,* June 2, 1999 ("OMB Guidance") at 93 (citing 5 C.F.R. § 1320.11(h)). Under the PRA, the only exception to the enforceability that otherwise obtains in the event of OMB approval of an ICR is established by the "public protection" provision, which states that, if an agency fails to display[9] a valid OMB control number along with a disclaimer that no response is required without the OMB control number, then no respondent may be penalized for failure to comply. *See* 44 U.S.C.A. § 3512; *see also In re Lazarus, Inc.*, 7 E.A.D. 318, 328 (EAB 1997) ("Although the legislative history suggests that is it a lack of OMB clearance that renders an ICR a "bootleg" request, Congress conditioned the public protection provision on the *display* of an OMB control number.") .

Significantly, in this case, Appellant does not attempt to avail himself of the PRA's public protection defense. Indeed, reviewing the record, the essential ingredients of enforceability under the PRA have

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[8]A final rule is a rule: (1) for which a general NPRM was published in the *Federal Register* unless persons subject thereto were named or personally served or otherwise had actual notice thereof in accordance with law; (2) whose NPRM included reference to the legal authority under which the rule was proposed, and either the terms or a description of the subjects and issues addressed by the proposed rule; (3) for which interested persons were given an opportunity to submit written data, views, or arguments on the proposal; and (4) that was published in final form in the *Federal Register* not less than 30 days before its effective date. *See* 5 U.S.C. § 553(b).

[9]In the case of collections of information published in regulations, an OMB control number is considered "displayed" when it is published in the *Federal Register* (*e.g.*, when it is published "in the preamble or regulatory text for the final rule [containing the information collection], in a technical amendment to the final rule, or in a separate notice announcing the OMB approval of the collection of information"). 5 C.F.R. § 1320.3(f)(3). *See also* OMB Guidance at 36.

been satisfied here. When EPA published the final Disclosure Rule in the *Federal Register* on March 6, 1996, the Agency included the following disclaimer:

> The information requirements are not effective until OMB approves them. * * * An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 C.F.R. part 9 and 48 C.F.R. Chapter 15. Upon OMB approval, EPA will issue a notice in the *Federal Register* to announce OMB's approval and to make a technical amendment to include a reference to this approval in 40 C.F.R. part 9.

61 Fed. Reg. 9064, 9082 (Mar. 6, 1996). Thereafter, when OMB granted approval of the information collection requirements in the Disclosure Rule and assigned it OMB Control No. 2070-0151, EPA issued the following notice in the *Federal Register* announcing, inter alia, OMB's approval of the Disclosure Rule ICR:

> In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq*.), this notice announces the Office of Management and Budget's (OMB) responses to Agency PRA clearance requests. * * * The OMB control numbers for EPA's regulations are listed in 40 C.F.R. Part 9 and 48 C.F.R. Chapter15.
>
> * * * *
>
> OMB Approvals[:]
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> * * * *

> EPA ICR No. 1710.02; Residential Lead-Based Paint Hazard Disclosure Requirements; was approved 04/22/96; OMB No. 2070-0151; expires 04/30/99.

61 Fed. Reg. 27,348-49.

EPA subsequently displayed the OMB control number for sections 745.107 and 745.113 in the Part 9 Table of 40 C.F.R., *see* 40 C.F.R. § 9.1 (1996, 1997, 1998), thereby satisfying the requirements of the PRA. *See In re EK Assoc., L.P.*, CAA Appeal No. 98-4, slip op. at 15, (EAB, June. 22, 1999), 8 E.A.D. ___ ("This notice of EPA's plan for displaying OMB Control numbers [in the Part 9 Table] satisfies the requirements of * * * the PRA * * *."). Given the foregoing, EPA was authorized under the PRA to enforce sections 745.107 and 745.113 of the Disclosure Rule at the time of Appellant's violations in November, 1997.

Bereft of any defense under the PRA, Appellant instead bases its challenge to enforceability on the theory that the otherwise enforceable Disclosure Rule was rendered unenforceable by virtue of the following editorial note published in the *Code of Federal Regulations*:

> This Section contains information collection requirements and will not become effective until approval has been given by the Office of Management and Budget. A notice will be published in the FEDERAL REGISTER once approval has been obtained.

See 40 C.F.R. §745.107 (1996-98)(editorial notes). To succeed in its argument, Appellant would have to show first that editorial notes have the same legal status as regulatory text, such that an editorial note could render unenforceable an otherwise enforceable rule and, second, that the editorial note in question signaled that the rule was ineffective during the relevant time frame. We are not persuaded on either front.

In support of its argument that editorial notes can have legal effect, Appellant points to the federal statute authorizing the establishment of the *Code of Federal Regulations*, 44 U.S.C. § 1510(a), which, according to Appellant, stands for the proposition that anything printed in the *Code of Federal Regulations*, such as effective date notes, has the force of law. In particular, Appellant argues that, "pursuant to section 1510(a) of Title 44 of the United States Code, the Code of Federal Regulations (CFR) has 'general applicability and legal effect' * * *." Appellant's Brief at 5. In truth, however, the language in 44 U.S.C. § 1510(a) provides that:

> The Administrative Committee of the *Federal Register*, * * * may require, from time to time * * * the preparation and publication in special or supplemental editions of the *Federal Register* of complete codifications of *the documents of each agency of the Government having general applicability and legal effect*, issued and promulgated by the agency by publication in the *Federal Register* * * * .

44 U.S.C. § 1510(a) (emphasis added).

As can be seen, the phrase "has general applicability and legal effect" refers to "the documents of each agency of the Government," rather than to the *Code of Federal Regulations* en masse as Appellant argues. Appellant, purporting to paraphrase 44 U.S.C. § 1510(a), also argues that, "[the] Code of Federal Regulations must be 'relied upon by the agency as authority for, or are invoked or used by it in the discharge of, its activities and functions, and are in effect as to facts arising on or after dates specified by the Administrative Committee." Appellant's Brief at 5. The relevant text, however, actually provides that:

> [T]*he documents of each agency of the Government having general applicability and legal effect*, issued and promulgated by the agency by publication in the *Federal Register* * * * and are relied upon by the

> agency as authority for, or are invoked or used by it in the discharge of, its activities or functions, and are in effect as to facts arising on or after dates specified by the Administrative Committee.

44 U.S.C. § 1510(a) (emphasis added). Here again, it is the body of *agency documents* that are published in the *Code of Federal Regulations* -- not editorial notes added by the Office of Federal Register -- that are key.

The statutory provision cited by Appellant offers no genuine support for his argument that editorial notes have general applicability and legal effect by virtue of their mere presence in the *Code of Federal Regulations*. Indeed, a related statutory provision, 44 U.S.C. § 1501, contrarily suggests that the Agency "documents" having general applicability and legal effect do not include editorial notes in the *Code of Federal Regulations*. Specifically, the term "document" is defined by 44. U.S.C. § 1501 as "a Presidential proclamation or Executive order and an order, regulation, rule, certificate, code of fair competition, license, notice, or similar instrument, issued, prescribed, or promulgated by a Federal agency."[10] *Id.* The common thread among the Agency instruments listed as "documents" is that they impose a legal responsibility or establish a right and, where not expressly exempted by the Administrative Procedures Act ("APA"), 5 U.S.C. § 551,[11] must

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[10]These terms are in turn defined in the Administrative Procedures Act, 5 U.S.C. § 551. A "rule," for example, is defined, in pertinent part, as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency * * *." *Id*. § 551(4).

[11]The APA excludes from the requirement of advance publication and public comment, interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice; or when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public

(continued...)

undergo advance public notice and comment before issuance or promulgation.[12]

Significantly, editorial notes of the kind at issue do not themselves undergo advance publication, nor do agencies seek public comment on them. Rather, they are placed in the *Code of Federal Regulations* by OFR as a convenience to the public. As such, they do not purport to have independent legal stature. Consequently, we conclude that the better view is that an editorial note like the one at issue here is not itself a regulation having the force and effect of law. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979), *quoting Morton v. Ruiz*, 415 U.S. 199, 232 (1974) (holding that regulations must meet three requirements to have the force and effect of law: they must be substantive or legislative-type rules, have been promulgated pursuant to congressional grant of quasi-legislative authority, and have been promulgated in conformity with congressionally imposed procedural requirements, such as the notice and comment provisions of the APA). Accordingly, the editorial note in question could not have served to nullify the otherwise enforceable regulation to which it was attached.

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[11](...continued)
procedure thereon are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. § 553(b)(3). The APA notice and comment rulemaking requirements also do not apply to such documents as licenses and orders, which are not considered rules, and have separate proceedings for their issuance. *See* 5 U.S.C. §§ 554, 558.

[12]*See supra* note 8; *see also* 5 U.S.C. § 553(b) (requiring that (1) an NPRM be published in the *Federal Register*; (2) the NPRM notice include, among other things, reference to the legal authority under which the rule is proposed, and either the terms or a description of the subjects and issues to be addressed by the proposed rule; (3) interested persons be given an opportunity to submit written data, views, or arguments on the proposal; (4) a concise general statement of the basis and purpose accompany the final rule; and (5) the final rule be published not less than 30 days before its effective date).

In any case, in our view, Appellant seriously overstates the thrust of the note's text in arriving at the conclusion that it signaled that, "as of July 1, 1996, the CFR stated that the regulations at issue *were not in effect* because the OMB has not approved such regulations." Appellant's Brief at 5 (emphasis added). By its terms, the note stated that the rule would "not be effective until approval has been given by the Office of Management and Budget. A notice will be published in the *Federal Register* once approval has been obtained." *See* 40 C.F.R. §§ 745.107, 745.113 (July 1, 1996, 1997, 1998). Fairly read, this text conveys that the regulation could be in effect at any time, depending on when OMB approval was secured. As previously discussed, OMB had approved the collection requirements and EPA had published notice of this approval in both the *Federal Register* and the *Code of Federal Regulations*. *See* 61 Fed. Reg. 27,348-49 (May 31, 1996); 40 C.F.R. § 9.1 (1996). An interested member of the public had merely to consult the Part 9 Table to learn that OMB had, in fact, granted approval. The editorial note served to put the public on notice of the need for such consultation.

This is not to say that the inclusion of the editorial note in the editions of the *Code of Federal Regulations* printed after OMB's approval of the information collection requirements did not add an element of potential confusion to the regulation, as codified. Indeed, it certainly would have been better had this artifact not been inadvertently carried forward. Had it been dropped, for example, there would have been no reason to question the rule's enforceability and the additional step of consulting the Part 9 Table would have been unnecessary. Accordingly, while we have concluded that any confusion engendered by the effective date note did not render the rule unenforceable, it does strike us that the question of detrimental reliance on an editorial note in the *Code of Federal Regulations* could, in an appropriate case, be considered in calculating the penalty to be assessed in response to a violation. *See* TSCA § 16, 15 U.S.C. § 2615(a)(2)(B) (calling for consideration of, e.g., "the degree of culpability, and such other matters as justice may require" in the assessment of a penalty); *see also* EPA's Interim Enforcement Response Policy for the Residential Lead-based Paint Hazard Reduction Act of 1992 (Jan. 1998) at 14-17.

In this case, however, Appellant has not alleged, nor is there evidence, that he relied upon the erroneous editorial note to his detriment. To the contrary, Appellant averred that he was "unaware of the various EPA sections and regulations cited in the Government's Complaint." Answer at 1. Consequently, we find no basis for penalty mitigation on this ground based on the record before us.

IV. *CONCLUSION*

Upon consideration of the issues raised on appeal, we affirm the Presiding Officer's Initial Decision in its entirety, including the assessment of a civil penalty of $29,700 against Appellant. Appellant shall pay the full amount of the civil penalty within thirty (30) days after the filing of this Final Decision. Payment shall be made by forwarding a certified or cashier's check payable to the Treasurer, United States of America, at the following address:

U.S. Environmental Protection Agency
Region VII
Kathy Robinson, Regional Hearing Clerk
P.O. Box 360748
Pittsburgh, PA 15251-6748

So ordered.